nonetheless officers of the court and as such must maintain an even balance between all the persons whose interests are involved in the winding-up. They are not appointees or agents of "the competent authority" and are not obliged to take directions from the competent authority nor to act on any directions from the competent authority.

Having regard to the foregoing I would allow the appeal in so far as the order for costs is concerned and would order that the costs of all parties to this application be taxed and paid out of the assets of the company.

As regards the costs of this appeal I would apply the normal principle and as the appellants have failed on the substantial point they must pay the liquidators' costs.

Barakbah C.J. (Malaya) and **Tan Ah Tah F.J.** concurred

Order accordingly.

Solicitors: *N. Sharma; Shearn Delamore & Co.*

CHE ESAH & ANOR. v. CHE LIMAH

[F.C. (Barakbah C.J. (Malaya), Ismail Khan and Abdul Aziz JJ.) September 6, 1965]

[Kuala Trengganu — Federal Court Civil Appeal No. 119 of 1964]

Landlord and Tenant — Widow of tenant since remarried — Whether still a widow of tenant within the definition — Control of Rent Ordinance, 1956, s. 12(1).

Practice and Procedure — Application to withdraw admission by counsel — Whether this can be made orally.

The respondent obtained an order against the appellants for the surrender of vacant possession of certain premises and damages for unlawful occupation of the said premises. The appellants appealed on the ground that the first appellant was a widow of the deceased tenant and that she was therefore protected by the Control of Rent Ordinance, 1956. At the hearing counsel for the appellants applied to withdraw an admission made by their former counsel at the trial that the first appellant was no longer a widow, as she had remarried after the death of her former husband who was the tenant.

Held: (1) the first appellant was a "widow" of the tenant for the purposes of the Control of Rent Ordinance, 1956;

(2) the law applicable was the law as it existed at the date of hearing and as the tenancy was then protected by the Control of Rent Ordinance, 1956, no order for possession could be made;

(3) the admission made by the former counsel in this case was an erroneous statement of law and could be withdrawn on an oral application to the court.

Cases referred to:—

(1) *Apsley* v. *Barr* [1928] N.I. 183; 31 E. & E. Digest 666.

(2) *Hutchinson* v. *Jauncey* [1950] 1 K.B. 574.

(3) *Remon* v. *City of London Real Property Co. Ltd.* [1921] 1 K.B. 49.

(4) *State of Perak* v. *Muthukaruppan Chettiar* [1938] M.L.J. 247 at p. 256.

FEDERAL COURT.

A. Wilson for the appellants.

H. L. Wrigglesworth for the respondent.

Barakbah C.J. (Malaya): This case originated in the Sessions Court at Pasir Mas. The claim was for vacant possession of premises No. 56 Jalan Market, Pasir Mas, and damages for unlawful occupation of the said premises. The learned president ordered the defendants to surrender vacant possession of the said house. The defendants appealed against this order to the High Court, Kota Bharu, and the learned judge dismissed the appeal. They now appeal to this court.

The brief facts of the case are that the respondent (plaintiff) is the owner of the said premises. She rented it out to one Mohamed Merah on a monthly tenancy. Mohamed Merah died in 1947 leaving his widow, the first appellant, and a son, the second appellant, in occupation of the house. The first appellant remarried and went to live with her new husband at Dungun, Trengganu. During her absence, the said premises was occupied by one Packeer Mohamed till 1962 when he went back to India. According to the respondent the first appellant then resumed occupation of the said premises. This was denied by the first appellant who contended that she was in continuous occupation from the death of her husband.

At the beginning of the hearing, Mr. Wilson, counsel for the appellants, applied for permission to withdraw the admission made by Che Hashim, former counsel for the appellants, on the ground that it was an erroneous statement of law. It is on record that the said counsel submitted "I agree first defendant is no longer a widow and not protected by Control of Rent Ordinance." Mr. Wrigglesworth, counsel for the respondent, argued that the appellants had first of all to show that it was an erroneous statement of law and although he was taken by surprise he was prepared to proceed with the hearing. I agreed with Mr. Wrigglesworth and the hearing proceeded.

The first question for the decision of the court is whether the first appellant is a "widow" under the Control of Rent Ordinance 1956. Section 12(1)(i) states:

> "No order of judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases, namely —
>
> (i) where neither the tenant nor any member of his family is personally in occupation of the premises or any part thereof;"

and according to the definition of "tenant" under section 2(1) it includes "the widow of a tenant

who was residing with him at the time of his death."

In his submission, counsel for the appellants stated that although first appellant remarried, she was still a widow under the said Ordinance. According to *Megarry's* The Rent Acts 9th Ed. page 203 the tenancy of a widow was not limited in duration to her widowship, and so remained unaffected by her remarriage. In the case of *Apsley* v. *Barr* [1] — "Plaintiff" was the owner of a dwelling-house subject to Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The premises had been let as a weekly tenancy, in or about 1923, to N., who was then in plaintiff's employment, at the rent of 5s. per week. N. died intestate in June, 1926, leaving defendant his widow, who up to the time of his death resided with him. On the death of her husband, defendant remained in occupation and entered into legal possession of the house under Increase of Rent, etc. (Restrictions) Act, 1920, section 12(1)(g). Defendant married again in March 1928, and her second husband and his children came to reside in the house occupied by her. The landlord instituted ejectment proceedings against defendant who claimed the protection of Increase of Rent (Restrictions) Acts. Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, section 12(1)(g), provides that 'the expression tenant includes the widow of a tenant dying intestate who was residing with him at the time of his death': *Held*: the widow acquired a vested interest as tenant, and there was nothing in Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which divested this interest on her second marriage." The definition of tenant in section 12(1)(g) of Increase of Rent and Mortgage Interest (Restrictions) Act 1920 is similar to that under section 2(1) of our Control of Rent Ordinance. In view of the above authority I am of the opinion that the first appellant was a "widow" under the Control of Rent Ordinance and that the admission of Che Hashim was an erroneous statement of law.

The next point for consideration is whether the first appellant had left the premises and then reoccupied it in 1962 as alleged by the respondent. First appellant denied this and stated that she was in continuous occupation from the death of her husband. But assuming that she had left and then came back would it affect the tenancy of the premises? Referring again to *Megarry* on The Rent Act 9th Ed. p. 224 it was stated that although the landlord's claim to possession at common law must be complete when the proceedings are commenced, the circumstances relevant to his claim to possession under the Acts, both as to reasonableness and, in general, the specific heads, are those existing not when proceedings are commenced but at the date of the hearing by the court of trial, and not the Court of Appeal. See the cases of *Hutchinson* v. *Jauncey* [2] and *Remon* v. *City of London Real Property Company, Ltd.* [3] In the present case, no notice was served on the legal representative of the deceased tenant or the Chief Justice. The only notice served was on the widow, the first appellant, on 28th February 1963 and the hearing in the Sessions Court began on 27th November 1963. In my view, therefore, as the law applicable was the law as it existed at the date of the hearing, and as the tenancy was then protected by the provisions of the Control of Rent Ordinance 1956, no order for possession could be made.

There is one other matter which should be mentioned on the question as to whether the proper application is by way of motion for the withdrawal of the admission by the defendants' counsel or can be made orally. The answer could be found in the case of *The State of Perak* v. *P.R.A.L.M.N. Muthukaruppan Chettiar.* [4] McElwaine C.J. (S.S.) stated *inter alia*:

> "In *P.M.N.T. Ramasamy Chetty* v. *Syed Alsagoff*, 7 F.M.S.L.R. 93, Thorne J. at p. 120 said:
>
> 'Counsel for the respondent at the hearing below conceded that the respondent was the representative in interest of her own nominees, namely, the persons named in the transfers to the appellants as transferors. In the Court of Appeal counsel submitted that there was an erroneous view of the law and that the respondent could be heard to say, notwithstanding this statement or admission, that it was erroneous. I incline to the opinion that this submission is correct. It seems to me that the statement of counsel below amounted to no more than that his opinion on the facts proved was that the respondent was the representative in interest of his own nominees and that he did not propose to argue that they were not. I think that the respondents are now at liberty to urge that this opinion was incorrect.'
>
> This passage which gives fuller reasons than Farrer-Manby J. gave at p. 115 for allowing the withdrawal appears to me exactly in point. The admission of counsel below appears to have been erroneous in law. But I would go further and say that as an admission it differs from ordinary admissions which may be said to be evidence of matters of which the court had not full knowledge such as the admission in *Hallen* v. *Worman*, 3 L.T. (N.S.) 741 and *Urquhart* v. *Butterfield* 37 Ch. D. 357. In this case counsel's admission introduced no new evidence. Had he stated that further enquiry had satisfied the commissioner of estate duty that the property was joint family property, it would have been very different.
>
> He gave his own opinion of the facts proved. 'The last witness has altered my view.' There was no reason why the last witness should have altered the views of the judge on the evidence before him. The admission was accepted by the judge and forms the basis of this part of his judgment.
>
> In my opinion this court should disregard the admission on the grounds that it was an erroneous statement of law no more binding or authoritative than many other bizarre propositions of law to which courts have to listen."

I therefore hold that an application for withdrawal of admission on the ground that it was an erroneous statement of law could be made to

the court orally. In the circumstances I would allow the appeal with costs.

Ismail Khan and **Abdul Aziz JJ.** concurred.

Appeal allowed.

Solicitors: *Wilson & Co; Wrigglesworth & Co.*

KERPA SINGH v. BARIAM SINGH

[F.C. (Barakbah C.J. (Malaya), Ismail Khan and Abdul Aziz JJ.) September 6, 1965]

[Kuala Trengganu — Federal Court Civil Appeal No. 31 of 1965]

Bankruptcy — Setting aside bankruptcy notice — Satisfaction of judgment debt by third party — Appeal from.

Contract — Accord and satisfaction — Acceptance of tender by third party of smaller amount by cheque in settlement of a larger sum — Whether section applies where the debt is a judgment debt — Contracts (Malay States) Ordinance, 1950, s. 64.

This was an appeal against an order that the bankruptcy notice taken out by the appellant creditor be set aside on the ground that the judgment debt had been satisfied by the tender by a third party of a cheque for a smaller amount than the sum due as payment in full, which cheque was accepted and cashed by the creditor. It was argued by the appellant that on the facts there was no accord and satisfaction and in any event section 64 of the Contracts (Malay States) Ordinance, 1950, had no application where the parties stood to each other in the position of judgment debtor and decree holder.

Held: as the creditor had accepted the tender by cashing the cheque and retaining the money he must be taken to have agreed to discharge the debtor from any further liability.

Case referred to:—

(1) *In Firm Basdeo, Ram Sarup* v. *Firm Dilsukh Rai, Sewak Ram* (1922), I.L.R. 44 All.

FEDERAL COURT.

H. L. Wrigglesworth for the appellant.

A. Wilson for the respondent.

Abdul Aziz J.: This is an appeal against the decision of the Honourable Mr. Justice M. M. Hashim given at Kota Bharu on the 21st day of May, 1962 allowing the application of the respondent debtor to set aside a bankruptcy notice taken out by the appellant creditor against him and one other person on the ground that the judgment debt has been satisfied by the tender by a third party of a cheque for a smaller amount than the sum due as payment in full, which cheque was accepted and cashed by the creditor.

The facts as ascertained by the learned judge are briefly: As a result of a previous litigation between the parties, the appellant creditor was awarded a decree of $8,869.94 including costs. On 6th February, 1964, Mr. Wrigglesworth of Messrs. Wrigglesworth and Co., solicitors for the creditor took out bankruptcy notice against the debtor and the other person which was issued on 10th February, 1964. The ground on which the application to set aside the bankruptcy notice was made was that there was full discharge of his liability by the acceptance of an offer of a smaller amount made by a third party subject to conditions. The offer was contained in a letter dated 30th July, 1963 from one Gurbakhash Singh, son of the appellant debtor to Mr. Wrigglesworth and, to appreciate the import, I quote his letter in full:—

"Dear Mr. Wrigglesworth,

I am the son of Mr. T. Bariam Singh. I came to know through my father and Mr. Bhan Singh, the court interpreter of Raub that you have agreed to receive $4,000 (Dollars four thousand only) from my father being payment in full settlement of his share in the above civil suit towards the decretal amount and costs amounting to $8,650. Upon payment of this sum you have agreed that you would take no action whatsoever against my father and that the balance thereof to sue against the other defendant Mr. Bachan Singh.

Due to undue delay in getting the required amount I could not get in touch with you in time as you have left for U.A.R.

I now enclose a receipt for $4,000 paid by a cheque at your firm in Kota Bharu.

I pray you will accept the payment and agree to allow to discharge my father Mr. Bariam Singh from any further liability.

If you don't agree to the above settlement please return me my money.

I am, Sir,
Yours faithfully,
Sgd: Gurbakhash Singh."

The cheque was cashed and the money was retained by the solicitor.

It was urged by the appellant that on the facts there was no accord and satisfaction and in any event section 64 of the Contracts (Malay States) Ordinance, 1950, has no application where the parties stand in relation to each other as judgment debtor and decree holder. That section reads:—

"64. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit."

It will be noted that this section materially alters the English doctrine of accord and satisfaction, as to the right of a party to take advantage of a release made for his benefit. Further it has been held that this section cannot be enlarged by any implication of the English doctrine and English authorities would therefore be misleading. In India, they have apparently been scrupulously avoided.

It has been urged again basing on Indian authorities that this section does not apply whether the parties stand in the position of judgment creditor and judgment debtor. That